



## ARTICLES

### SPECIAL SECTION – SOCIAL INTEGRATION IN EU LAW: CONTENT, LIMITS AND FUNCTIONS OF AN ELUSIVE NOTION

# SOCIAL INTEGRATION OF REFUGEES AND ASYLUM SEEKERS THROUGH THE EXERCISE OF SOCIO-ECONOMIC RIGHTS IN EUROPEAN UNION LAW

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ABSTRACT: Economic and social rights are key for a successful integration of aliens. Indeed, they represent a considerable part of the content of the international protection status in the Qualification Directive, in accordance with the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and other relevant human rights treaties. However, in some cases EU rules allow a differential treatment of beneficiaries of international protection as compared with nationals and, despite the unification of statuses accomplished in the recast Qualification Directive, to some extent a distinctive treatment of beneficiaries of subsidiary protection status is still tolerated in this area. This is even more true for those who are merely asylum seekers: the relevant legal machinery is built around the idea that they should receive differential treatment. A review of the Union's commitment to social integration of beneficiaries of international protection also extends to its competences concerning affirmative actions and integration programmes.

KEYWORDS: socio-economic rights – beneficiaries of international protection – non-discrimination – affirmative actions – integration programmes – asylum seekers.

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## I. INTRODUCTION

The notion of integrating aliens – or of integrating them *socially*, which in common parlance means the same – is equal parts clear and vague. If it undoubtedly suggests the process whereby aliens become full members of society in the country where they have settled down (or the successful result of such a process),<sup>1</sup> then the idea of becoming full members of a society is everything but definite, especially for those who do not acquire citizenship.<sup>2</sup> A case in point of this ambiguity can be seen in the area of family life. Recital 4 of the Family Reunification Directive's preamble clarifies that family reunification – i.e. the entry into and residence in a Member State of a family member of a third-country national legally residing in that Member State – is deemed to facilitate integration of aliens because it “helps to create sociocultural stability”.<sup>3</sup> The Office of United Nations High Commissioner for Refugees (UNHCR) has the same approach.<sup>4</sup> Yet the concept of “social integration” of members of a minority can be understood as their ability to enter into relationships in the private sphere with those belonging to the majority, including forming a couple and getting married.<sup>5</sup> Both views make perfect sense.

<sup>1</sup> Social integration corresponds to one of the “three durable solutions available to refugees”, which the United Nations High Commissioner for Refugees (UNHCR) refers to as “local integration”: UNHCR Executive Committee, Conclusion no. 104 of 7 October 2011 on Local Integration, [www.unhcr.org](http://www.unhcr.org). A full picture of the legal issues of refugees' local integration is in C. MURPHY, *Immigration, Integration and the Law. The Intersection of Domestic, EU and International Legal Regimes*, Farnham: Ashgate, 2013, pp. 79-87.

<sup>2</sup> At least legally, naturalization is the ultimate tool for the social integration of aliens. Art. 34 of the 1951 Geneva Convention relating to the Status of Refugees (hereinafter, the Geneva Convention) encourages naturalization as it lays down the obligation to facilitate it “as far as possible”, to expedite and remove obstacles in the related proceedings. No word on the matter is contained in the Qualification Directive (see below, footnote no. 10), to the criticism of the UNHCR: UNHCR, Annotated Comments of 29 April 2004 on the Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, p. 46. It should be highlighted that the EU has no competence on measures regarding naturalization of aliens in Member States.

<sup>3</sup> Directive 2003/86/EC of the Council of 22 September 2003 on the right to family reunification. The statement in recital 4 is suitable for all aliens, yet it is useful to point out that Directive 2003/86 is applicable when the sponsor is entitled to international protection within the meaning of the Common Asylum System of the Union (CAS) (but not when he/she is still awaiting a final decision on his/her refugee status). Interestingly, UNHCR, Note on the integration of refugees in the European Union, May 2007, [www.unhcr.org](http://www.unhcr.org), conveys the same vision on the role of family unity for a successful integration of refugees. The reason given in the Note is that “[f]amily members can reinforce the social support system of refugees” (para. 35).

<sup>4</sup> UNHCR, Note on the integration of refugees in the European Union, cit., para. 35.

<sup>5</sup> R. MEDDA-WINDISCHER, *Nuove minoranze. Immigrazione tra diversità culturale e coesione sociale*, Padova: CEDAM, 2010, p. 203. The Author broadly refers to social relationships of any kind, also including friendships and charity work. On the problematic interaction between majority and minority with regard to societal integration of members of the latter (especially if the minority is made of migrants) see D. KOSTAKOPOULOU, *Liberalism and Societal Integration: In Defence of Reciprocity and Constructive Pluralism*, in *Netherlands Journal of Legal Philosophy*, 2014, p. 127 *et seq.*: the analysis is framed in and aimed at

From a legal perspective, the two-way process through which integration is often described<sup>6</sup> is not one involving free political choice but rather one with a solid background in international and Union law (as well as in the constitution of the Member States).<sup>7</sup> Both directions of this process are guided by the law. The fact that refugees (and indeed any other aliens) cannot be obliged to forego their own cultural identity (which is the limit to the first direction of the integration process focussing on refugees' adjustment to the host society) is an exercise of their civil rights. In turn, the fact that host communities and public institutions should make the necessary adaptations to meet the needs of newcomers – i.e. the second direction of the process – is grounded in these same rights. Hence the law, particularly international and EU law, includes the notion of social integration and highly contributes to define its content. If multiculturalism is patently compliant with international and EU legal requirements, assimilation is subject to legal constraints that neutralize its polarization *vis-à-vis* multiculturalism inasmuch as they stand in the way of cancelling cultural diversity and also discriminating against aliens.

Moreover, the bi-directional process described above can hardly be different for refugees and for other aliens legally residing in an Member State. Therefore, it seems to me that this is of little interest in an essay on social integration of those entitled to international protection within the meaning of the EU Common Asylum System and/or those who have applied for such status (whom I occasionally refer to as “refugees” for the sake of brevity). Instead, I find it more interesting to investigate the legal tools and/or grounds for which they might receive differential treatment as compared with other aliens. Since a legal assessment of differences in treatment should be focused primarily on the aim of those differences, the issue of the definition of social integration remains key. With the concept of the bi-directional process in the background, and

further developing a philosophical concept of societal integration which I wittingly sidestep here as of little help for the present reflections.

<sup>6</sup> UNHCR, Note on the integration of refugees in the European Union, cit., para. 1. The integration policies developed by the European institutions took their cue from a definition of integration built on the concept of two-way process, in the European Council Conclusions of 19-20 June 2003: G. CAGGIANO, *L'integrazione dei migranti fra soft-law e atti legislativi: competenze dell'Unione e politiche nazionali*, in G. CAGGIANO (a cura di), *I percorsi giuridici per l'integrazione. Migranti e titolari di protezione internazionale tra diritto dell'Unione e ordinamento italiano*, Torino: Giappichelli, 2014, p. 32. See also Council of the European Union, document 14615/04 of 19 November 2004, *Common Basic Principles for Immigrant Integration Policy in the European Union*, Communication COM(2005) 389 final of 1 September 2005 from the Commission, *A Common Agenda for Integration. Framework for the Integration of Third-Country Nationals in the European Union*. According to D. KOSTAKOPOULOU, *The Anatomy of Civic Integration*, in *The Modern Law Review*, 2010, p. 933 *et seq.*, the said two-way process is betrayed through the development of a civic integration paradigm which, in reality, embodies a one-way process; the Author argues that, despite the reiteration of the two-way process doctrine, this paradigm is left room in EU law.

<sup>7</sup> In the context of an overabundance of literature on the topic, C. MURPHY, *Immigration, Integration and the Law*, cit., pp. 87-124 provides a streamlined overview of the role of international human rights law in addressing integration issues.

bearing in mind the open-ended, neutral idea of integration that underpins many legal and policy acts, it seems reasonable to rely on a purposeful and flexible notion through which a refugee may perceive himself/herself, and be perceived, as a member of his/her host community despite being a recent addition. This is possible only if his/her presence is secure and those concerned have reached a certain stability in terms of the ability to sustain themselves economically, to undertake economic activity or to obtain employment, to access a decent accommodation, to send their children to school and to develop a private and cultural life.

To this end, economic and social rights are key.<sup>8</sup> Hence, I first review the EU rules on the matter as applicable to those entitled to international protection, with a focus on their differential treatment compared with nationals of the host State and on their equal treatment with other aliens entitled to reside there. Along this line of reasoning, I next consider the domestic discriminatory measures aimed at the integration of those granted subsidiary protection status, which have been submitted to the Court of Justice for preliminary ruling in the case of *Alo and Osso*.<sup>9</sup> A review of those grounds for discrimination that have been respectively ruled out or green-lighted, on the basis of EU law, provides the occasion to further evaluate the peculiar situation of beneficiaries of international protection concerning integration. As national treatment can do little for social integration of those who are particularly vulnerable like refugees and those who flee from a real risk of suffering serious harm (as per the definition of subsidiary protection status), affirmative actions and integration programmes can make a difference: I briefly investigate the Union's competence and practice in this connection. As a last point, I consider the integration of those who spend time awaiting a decision on their status in the framework of Directive 2011/95 (the Qualification Directive):<sup>10</sup> as convincingly pointed out, especially if they have entered a Member State illegally in such a way as to have never been entitled to a residence permit there, their early experience in their country of asylum-to-be will probably be crucial to the quality of the relations that they then develop with that country. If social

<sup>8</sup> This has been acknowledged in multiple sources with no exception. See UNHCR Executive Committee, Conclusion on Local Integration, cit., let. k); Communication COM(2011) 455 final of 20 July 2011 from the Commission, *The European Agenda for the Integration of Third Country Nationals*.

<sup>9</sup> Court of Justice, judgment of 1 March 2016, joined cases C-443/14 and C-444/14, *Alo and Osso* [GC].

<sup>10</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. Directive 2011/95 recast former Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

integration also involves a sense of belonging, the treatment of asylum seekers might also be an important social integration issue.<sup>11</sup>

## II. ECONOMIC AND SOCIAL RIGHTS EQUAL TO THOSE OF NATIONALS

The portion of Qualification Directive concerning the content of international protection embraces economic and social rights in Arts 26-30. They are as follows: access to employment, including employment-related education opportunities and vocational training (Art. 26), access to education (Art. 27), access to procedures for recognition of qualifications (Art. 28), social welfare (Art. 29) and healthcare (Art. 30). These rights are granted under the same conditions as nationals, with three exceptions: access to education for adults, which States are obliged to allow under the same conditions as third-country nationals legally resident (Art. 27, para. 2); social assistance, which States are free to limit to core benefits<sup>12</sup> as regards beneficiaries of subsidiary protection status (Art. 29, para. 2); and access to accommodation, which should be ensured under equivalent conditions as third-country nationals legally resident (Art. 32, para. 1, of Directive 2011/95). The two latter provisions are mitigated as follows: Art. 29, para. 2, of Directive 2011/95 closes with the obligation, should States opt for limiting social assistance to core benefits, to provide them “at the same level and under the same eligibility conditions as nationals”; whereas Art. 32 of Directive 2011/95 lays down, with a certain degree of ambiguity, States’ endeavour to put into operation “policies aimed at preventing discrimination of beneficiaries of international protection and at ensuring equal opportunities regarding access to accommodation”. With regard to access to accommodation, the standard is aligned with that of host State nationals after beneficiaries of international protection obtain a residence permit as long-term stayers within the meaning of Directive 2003/109, after five years of lawful residence in a Member State:<sup>13</sup> here,

<sup>11</sup> I leave aside social integration of minors, including unaccompanied minors, since they raise specific legal issues which deserve a separate analysis: see F. IPPOLITO, G. BIAGIONI (eds), *Migrant Children: Challenges for Public and Private International Law*, Napoli: Editoriale Scientifica, 2016.

<sup>12</sup> Recital 45 of the Qualification Directive details core benefits through a non-exhaustive list covering minimum income support, assistance in the case of illness, or pregnancy, and parental assistance, “in so far as those benefits are granted to nationals under national law”. The list in recital 45 reflects that contained in recital 13 of the Directive 2003/109 of the Council of 25 November 2003 on the status of third-country nationals who are long-term residents, which similarly allows States to limit the right to social assistance to core benefits by way of derogation to the general rule on equality of treatment with nationals. Hence, the interpretation of the Court of Justice that the list in Directive 2003/109 is non-exhaustive and requires a restrictive interpretation can extend to the mirroring list in Directive 2011/95: Court of Justice, judgment of 24 April 2012, case C-571/10, *Kamberaj* [GC], paras 85-87. On this point see S. PEERS, *The Court of Justice Lays the Foundations for the Long-Term Residents Directive*: *Kamberaj*, Commission v. Netherlands, Mangat Singh, in *Common Market Law Review*, 2013, p. 542.

<sup>13</sup> Based on Directive 2003/109, in addition to the requirement of a five-year lawful and uninterrupted stay in a Member State (Art. 4), eligible conditions for long-term residence status are the availability of

according to Art. 11, para. 1, let. f), the holders of a long-term residence permit are entitled to the same treatment as nationals. However, even refugees who are long-term residents might not be treated with the national standard regarding access to education for adults: Art. 11, para. 3, let. b), of Directive 2003/109 allows States to require evidence of adequate language knowledge and to meet conditions on prior education.<sup>14</sup> The same applies regarding the right to social assistance, as also those granted long-term stayer status may have access to core provisions only.<sup>15</sup>

Granting rights equal to those of nationals is a tremendous tool of social integration. From a legal perspective, this makes a community established in a certain territory (i.e. in a certain State) homogeneous *vis-à-vis* the law, with no A-level and B-level individuals. Moreover, from a practical perspective, it makes it easier for refugees to reach that state of stability earlier identified in terms of social integration. Bestowing equality of rights is a highlight of the alien integration policy found in the conclusions of the Tampere European Council Presidency.<sup>16</sup>

stable and sufficient resources and health insurance (within the terms of Art. 5) and the fact that the applicant is not a danger for public order and public security in the host State (Art. 6). Directive 2003/109 applies to beneficiaries of international protection following Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection. The previous five-year stay requirement is adapted to the latter (Art. 1, point 3, let. b), of Directive 2011/51). On the integration of long-term stayers see, *ex multis*, M. JESSE, *Missing in Action: Effective Protection for Third-Country Nationals from Discrimination under Community Law*, in E. GUILD, S. CARRERA, K. GROENENDIJK (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Farnham: Ashgate, 2009, p. 187 *et seq.*, for reflections on the persistent differential treatment of long-term stayers (a point which would be a complement to the present analysis yet I have no room to address here accurately), and to A. DI STASI, R. PALLADINO, *La perdurante frammentarietà dello "statuto" europeo del soggiornante di lungo periodo tra integrazione dei mercati ed integrazione politico-sociale*, in *Studi sull'integrazione europea*, 2012, p. 375 *et seq.*; A. DI STASI, *L'integrazione del lungo soggiornante*, in G. CAGGIANO (ed.), *I percorsi giuridici per l'integrazione*, cit., p. 241 *et seq.*

<sup>14</sup> Based on the no-prejudice clause of Art. 1, point 6), of Directive 2011/51, Art. 11, para. 3, let. b), of Directive 2003/109 should not be interpreted in such a way as to lower the degree of protection granted to beneficiaries of international protection in the corresponding provision of the Qualification Directive.

<sup>15</sup> See Art. 11, para. 4, of Directive 2003/109. However, since Art. 1, point 6), of Directive 2011/51 establishes that Art. 11, para. 4, of Directive 2003/109 shall be without prejudice to the Qualification Directive, beneficiaries of refugee status (who are not covered by Art. 29, para. 2, of the Qualification Directive) should be excluded from the application of such a lower degree of protection.

<sup>16</sup> See European Council Conclusions of 15-16 October 1999, para. 18. The passage refers to the integration of third country nationals, who in the economy of the Conclusions as well as in the language of the European Union constitute a different category. However, there is no reason to understand it as *excluding* those third-country nationals who are entitled to international protection. Regardless, EU law commentators constantly assess issues pertaining to non-discrimination between aliens and nationals of the Member States or among aliens without taking into account beneficiaries of international protection: see, for instance, P. SIMONE, *Il principio di non discriminazione nella giurisprudenza della Corte di giustizia: i criteri applicativi*, in I. CASTANGIA, G. BIAGIONI (eds), *Il principio di non discriminazione nel diritto dell'Unione europea*, Napoli: Editoriale Scientifica, 2011, pp. 48-54; B. NASCIBENE, *Comunitari ed extracomunitari: le ragioni del doppio standard*, in *La condizione giuridica dello straniero nella giurisprudenza*

In the 1951 Geneva Convention on the Status of Refugees (the Geneva Convention), contracting States are obliged to grant refugees equivalent rights as *aliens*. This is true for acquisition of property (Art. 13), wage-earning employment (Art. 17), self-employment (Art. 18), professions (Art. 19), housing (Art. 21), and post-elementary education (Art. 22, para. 2).<sup>17</sup> What are the grounds for such an increase in the level of protection of refugees in EU law, given that the legal base for the Union's common policy on asylum, subsidiary and temporary protection requires compliance with the Geneva Convention and the 1967 Protocol (Art. 78, para. 1), a requirement echoed in Art. 18 of the Charter of Fundamental Rights of the European Union (Charter) on the right to asylum? From the preamble of the Qualification Directive it emerges that the grounds are twofold: the Charter (recital 16), and some unnamed international treaties to which the Member States are parties so that their participation in the Union requires coordination with such treaties (recital 17). More specifically, the choice to set the level of protection for refugees at that of nationals of the Member States is determined by the universal character of the economic and social rights they establish and by the principle of non-discrimination.

Recital 16 of the Qualification Directive explains that its purpose is "to promote the application" of some specific provisions of the Charter. Those worth mentioning in the present analysis are Art. 14 (right to education), Art. 15 (freedom to choose an occupation and right to engage in work), Art. 16 (freedom to conduct a business), Art. 21 (non-discrimination) and Art. 34 (social security and social assistance) of the Charter. Arts 26-29 of the Qualification Directive clearly mirror Arts 14, 15, 16 and 34 of the Charter, read in combination with the prohibition on discrimination on several grounds (particularly race, colour, ethnic origin and nationality) in Art. 21.<sup>18</sup> Interestingly, the choice to award beneficiaries of international protection the same level of protection as nationals (in relation to those economic and social rights deemed crucial for their integration) predates the

*costituzionale*, Atti del seminario svoltosi a Roma il 26 ottobre 2012, Milano: Giuffrè, 2013, p. 95 *et seq.*, available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it); C. FAVILLI, *L'applicazione ai cittadini di Paesi terzi del divieto di discriminazione sulla base della nazionalità*, in G. CAGGIANO (ed.), *I percorsi giuridici per l'integrazione*, cit., p. 115 *et seq.*; E. BROUWER, K. DE VRIES, *Third-Country Nationals and Discrimination on the Ground of Nationality. Article 18 TFEU in the Context of Article 14 ECHR and EU Migration Law: Time for a New Approach*, in M. VAN DEN BRINK, S. BURRI, J. GOLDSCHMIDT (eds), *Equality and Human Rights: Nothing but Trouble?*, Utrecht: SIM, 2015, p. 123 *et seq.*

<sup>17</sup> Instead, under the Geneva Convention contracting States are obliged to grant refugees equal rights with citizens as regards protection of intellectual property (Art. 4), rationing measures (Art. 20), elementary education (Art. 22, para. 1), public relief and assistance (Art. 23), and labour legislation and social security (Art. 24).

<sup>18</sup> The role of the Charter in support of migrants' integration is discussed in F. IPPOLITO, *La Carta dei diritti fondamentali quale strumento per l'integrazione dei cittadini comunitari ed extracomunitari: un primo bilancio*, in G. CAGGIANO (ed.), *I percorsi giuridici per l'integrazione*, cit., pp. 97-100: the Author shows the Charter's accomplishments based on Art. 18 but, while positive on the unexploited potentialities of this provision and of Art. 21, para. 1, she is skeptical about the role of Art. 21, para. 2, on the prohibition on discrimination on grounds of nationality.

awarding of binding legal effects upon the Charter, in 2009.<sup>19</sup> Directive 2004/83, repealed by the current Qualification Directive, had already set that level of protection,<sup>20</sup> the only substantial change having been that regarding the right to have access to employment-related education opportunities for adults, vocational training and practical workplace experience (an aspect of the right to have access to employment). Not only were beneficiaries of subsidiary protection status not entitled to the application of the same rules as nationals, but they could only benefit from such right “under conditions to be decided by the Member States”.<sup>21</sup> Instead, under the domain of the current Qualification Directive all beneficiaries of international protection are entitled to “equivalent conditions as nationals”,<sup>22</sup> this increased level of protection results from the establishment of a uniform status for refugees and for persons eligible for subsidiary protection.<sup>23</sup>

The preamble of Directive 2004/83 did not elaborate upon the reasons for granting all those within the Directive’s scope of application the same protection as nationals rather than as other aliens legally residing in the Member States (at least in principle). In connection with social assistance, it merely mentioned it being “appropriate [...] to avoid social hardship”:<sup>24</sup> indeed, a consideration reiterated in the recast Directive.<sup>25</sup> Interestingly, both preambles highlight the need to act without discrimination precisely in one area, namely social assistance, where the content of the status is such as to establish discrimination between nationals as well as between beneficiaries of international protection.<sup>26</sup> Regardless, the principle of non-discrimination on grounds of nationality ended up protecting the social rights of aliens in the framework of the European Convention on Human Rights (the Convention) many years ago, the Convention being a major

<sup>19</sup> I refer to 2009 as the year of the entry into force of the Lisbon Treaty, signed on 13 December 2007, which marks the acquisition by the Charter of the same legal value as the Treaties, pursuant to Art. 6, para. 1, TEU.

<sup>20</sup> F. IPPOLITO, *Cittadini provenienti da Paesi terzi: applicabilità e contenuto (variabile) del principio di non discriminazione*, in I. CASTANGIA, G. BIAGIONI (eds), *Il principio di non discriminazione*, cit., p. 132.

<sup>21</sup> Art. 26, para. 4, of Directive 2004/83. The exception did not cover beneficiaries of refugee status, who were already entitled to national treatment. The differential treatment of beneficiaries of subsidiary protection status in Art. 26, para. 4, of Directive 2004/83 received harsh criticism from the UNHCR. See UNHCR, *Annotated Comments*, cit., pp. 41-42. On the (almost complete) elimination of differences between refugees and those granted subsidiary protection status in the recast Qualification Directive see below, Section III.

<sup>22</sup> Art. 26, para. 2, of the Qualification Directive.

<sup>23</sup> See recital 39 of the Qualification Directive. On this point see further below, Section III.

<sup>24</sup> Recital 33 of Directive 2004/83.

<sup>25</sup> Recital 45 of the Qualification Directive.

<sup>26</sup> On the discrimination between beneficiaries of international protection in connection with social assistance see below, Section III.

source of general unwritten principles of EU law along with the common constitutional traditions of the Member States.<sup>27</sup>

If in Directive 2011/95 the Charter is acknowledged as the background for certain rules which indeed existed even before the Charter itself (at least with a legal value), the international treaties referred to in its recital 17 as complementing the said background did exist already at the time of Directive 2004/83, although they were not at all mentioned therein.<sup>28</sup> Those unspecified treaties no doubt include the Convention and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). Other potentially relevant treaties are the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),<sup>29</sup> the 1979 Convention on the Elimination of All Forms of Discrimination against Women, and the 1989 Convention on the Rights of the Child.<sup>30</sup> The ICESCR does not make explicit the application of the rights there recog-

<sup>27</sup> The ice-breaker in this area is European Court of Human Rights, judgment of 31 August 1996, case no. 39/1995/545/631, *Gaygusuz v. Austria*. A criticism of the European Court of Human Rights for this course of action is found in M. BOSSUYT, *Should the Strasbourg Court Exercise More Self-Restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations*, in *Human Rights Law Journal*, 2007, p. 321. The limited reach of *Gaygusuz* in the legislation of European States is argued (with regret) in M.-B. DEMBOUR, *Gaygusuz Revisited: The Limits of the European Court of Human Rights' Equality Agenda*, in *Human Rights Law Review*, 2012, p. 689 *et seq.* More generally, on the role of the European Court of Human Rights in the achievement of social rights of aliens by means of Art. 14 of the Convention (in combination with other provisions, given the necessary link between Art. 14 and other Convention's rights), E. BREMS, *Indirect Protection of Social Rights by the European Court of Human Rights*, in D. BARAK-EREZ, A. GROSS (eds), *Exploring Social Rights: Between Theory and Practice*, Oxford: Hart, 2007, pp. 158-159; M. DAHLBERG, *Should Social Rights Be Included in Interpretations of the Convention by the European Court of Human Rights?*, in *European Journal of Social Security*, 2014, p. 252 *et seq.*

<sup>28</sup> It clearly emerges from UNHCR, Annotated Comments, cit., that the UN Office did consider the international human rights treaties mentioned (yet unnamed) in the recast Qualification Directive as fully applicable to the content of international protection already at the time of Directive 2004/83. The Annotated Comments make it clear that they go beyond the Geneva Convention and that (alas!) they were not fully reflected in Directive 2004/83 (p. 35).

<sup>29</sup> The ICERD lays down the obligation to prohibit and to eliminate any form of racial discrimination in the enjoyment of economic, social and cultural rights (Art. 5): those relevant in the light of the Qualification Directive as compared with the Geneva Convention are the right to work (as detailed in a series of specific rights); the right to housing; the right to public health, medical care, social security and social services; and the right to education and training. The role of ICERD in the protection of refugees' rights on grounds of non-discrimination with nationals requires the careful assessment of the specific circumstances of the case, since it or ICERD does not apply "to distinctions, exclusions, restrictions or preferences made by a State Party [...] between citizens and non-citizens": Art. 1, para. 2, ICERD. On this point, including references to the practice of the ICERD Committee, see M. SSENYONJO, *Economic, Social and Cultural Rights in International Law*, Oxford: Hart, 2009, pp. 292-294.

<sup>30</sup> The Commission on Human Rights, Resolution 1999/44 of 27 April 1999, *Human Rights of Migrants*, relies on the following non-exhaustive list of instruments: the International Covenants on Human Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; and the Convention on the Rights of the Child.

nised to aliens, particularly to refugees, asylum seekers and those legally resident in a State. However, this can be inferred from both the phrasing of all the provisions establishing the actual rights (“everyone” is entitled), and from Art. 2, para. 2, ICESCR on the prohibition of discrimination on the basis of one’s national origin.<sup>31</sup> These arguments have long led the Committee on Economic, Social and Cultural Rights to understand ICESCR rights as extending to all those within the jurisdiction of States parties.<sup>32</sup> Notwithstanding the enduring absence of official documents on the ICESCR as a source of rights for refugees in completion and supplement to the Geneva Convention, there must be no doubt on the matter. The New York Declaration for refugees and migrants, adopted by the UN General Assembly in 2016, is a recent authority in this regard, having clarified that human rights are for “all refugees and migrants, regardless of status”.<sup>33</sup> A further argument in favour of this conclusion derives from Art. 2, para. 3, which allows developing countries to determine to what extent they would grant economic rights to aliens: this is clearly an exception, the general rule being the applicability of economic rights regardless of nationality.

<sup>31</sup> Economic and Social Council, Report of the Special Rapporteur on prevention of discrimination and the rights of non-citizens of 26 May 2003, UN Doc. E/CN.4/Sub.2/2003/23. The application of human rights to aliens in general terms (i.e. in connection to all human rights and to any category of aliens) is extensively argued on the basis of the prohibition on discrimination on ground of nationality in A. MARCHESI, Upholding the promise of Article 15: *sul complesso rapporto fra cittadinanza e diritti umani*, in S. MARCHISIO, C. CURTI GIALDINO, R. CADIN, L. MANCA (eds), *Scritti in memoria di Maria Rita Saulle*, Napoli: Editoriale Scientifica, 2014, pp. 888–892. On equality and non-discrimination in the ICESCR, see extensively M.C.R. CRAVEN, *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development*, Oxford and New York: Clarendon Press, 1998, p. 153 *et seq.* interestingly, the Author dwells upon the reluctance of the Covenant Committee to be steadily in defence of the equal treatment of aliens, which in his view is due to State practice (pp. 172–174).

<sup>32</sup> See, for instance, Committee on Economic, Social and Cultural Rights, General Comment no. 19, *The Right to Social Security*, E/C.12/GC/19, 4 February 2008, para. 23: “All persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalized groups, *without discrimination on any of the grounds prohibited under article 2, paragraph 2, of the Covenant*” (emphasis added). See also Commission on Human Rights, Resolution 1999/44, *cit.*, whose preamble includes the following: “every State party to the International Covenant on Economic, Social and Cultural Rights must undertake to guarantee that the rights enunciated in that Covenant will be *exercised without discrimination of any kind, including on the basis of national origin*” (emphasis added). Clear examples of the application of the ICESCR to refugees and asylum seekers emerge from the observations of the Committee on Economic, Social and Cultural Rights concerning the practice of specific States: see F. BESTAGNO, *Gli obblighi internazionali in materia di abitazione adeguata*, in F. BESTAGNO (ed.), *I diritti economici, sociali e culturali. Promozione e tutela nella comunità internazionale*, Milano: Vita e pensiero, 2009, p. 106. In legal literature, see also M. SSENYONJO, *Economic, Social and Cultural Rights*, *cit.*, pp. 288–289.

<sup>33</sup> General Assembly, New York Declaration for refugees and migrants of 3 October 2016, UN Doc. A/RES/71/1, para. 5. It is mainly concerned with human rights of refugees and migrants: its perspective is not to establish new rights for them but to reaffirm existing rights and to make sure that they are fully respected.

I would tend to see the Qualification Directive as evidence of the non-discriminatory character of social and economic rights on national grounds, or at least an authoritative contribution to their understanding in such a way.<sup>34</sup>

The European Social Charter is one of the international treaties the preamble of the recast Qualification Directive may be deemed to refer to.<sup>35</sup> It applies to refugees within the meaning of the Geneva Convention (whereas the Union directives also cover those falling within the scope of the subsidiary protection status) to the extent that it is possible, with the said Convention and “any other existing international instruments applicable to those refugees” marking the less favourable level of protection compatible with the Social Charter itself.<sup>36</sup>

### III. CASES WHERE DISCRIMINATION BETWEEN REFUGEES AND NATIONALS, OR BETWEEN THOSE RESPECTIVELY GRANTED REFUGEE STATUS AND SUBSIDIARY PROTECTION STATUS ON SOCIAL AND ECONOMIC GROUNDS, IS ALLOWED

Nothing in Directive 2011/95 prevents Member States from treating beneficiaries of international protection and nationals equally as regards their social and economic rights. This derives from its Art. 3, which allows the introduction or retention of more favourable standards regarding the content of international protection.<sup>37</sup> The equalization with nationals could be either a free political choice or a requirement found in constitutions. In the latter case, Art. 53 of the Charter leaves room for higher constitutional standards. Unlike in *Melloni*,<sup>38</sup> they are not barred by the principle of primacy of EU law as they do not conflict with Directive 2011/95 (Art. 3).

The fact remains that, as pointed out above, the Charter allows for a differential treatment between refugees and nationals only when justified. The recognition of the

<sup>34</sup> Despite its alleged flaws, which will be discussed in Section III, I deem as authoritative the Qualification Directive’s contribution because the Directive is a legally binding act, plus it refers to existing obligations of the Member States.

<sup>35</sup> The European Social Charter does not apply to aliens if not nationals of other State parties. In S. CANTONI, *La tutela internazionale del principio di uguaglianza*, cit., p. 559, this is understood as allowing a discrimination between nationals and aliens in the enjoyment of social rights.

<sup>36</sup> See the Appendix to the Revised European Social Charter (“Scope of the Revised European Social Charter in terms of persons protected”), Section 2. According to European Council on Refugees and Exiles (ECRE), Information Note of 7 October 2013 on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [www.ecre.org](http://www.ecre.org), p. 12, Directive 2011/95 should be applied in a manner compatible with the European Social Charter.

<sup>37</sup> Art. 3 is supported by recital 14 of the Qualification Directive.

<sup>38</sup> Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni* [GC], para. 58. As further specified immediately below, in this Section, the third country nationals standard is compliant with the Charter inasmuch as it is justified.

right to social and housing assistance “in accordance with the rules laid down by Union law and national laws and practices” (Art. 34, para. 3, of the Charter) in no way gives free rein to unjustified disparate restrictions at the level of EU secondary law or in domestic legislation.<sup>39</sup> I shall now examine whether this is the case, given that the preamble of Directive 2011/95 provides no explanation. The analysis takes advantage of the case-law of the European Court of Human Rights (the European Court) on Art. 14 of the Convention, which is a standard of interpretation of the Charter within the terms of Art. 51, para. 3, of the latter.<sup>40</sup> The European Court traditionally keeps the bar of discrimination on social and economic rights relatively low, as it acknowledges a very wide margin of appreciation for States in socio-economic subject-matter.<sup>41</sup>

The European Court carries out its assessment on the existence of discrimination by identifying a comparator who corresponds to the grounds of the discrimination, i.e. a type of individual with whom the alleged victim of discrimination is comparable in terms of shared characteristics. A difference in treatment is impermissible if the comparator is awarded the benefit denied to the applicant with no objective and reasonable justification.

The question arises as to whether nationals are comparators to those granted international protection as far as Arts 29, para. 2, and 32, para. 1, of the Qualification Directive are concerned. Beyond nationality itself, which by definition cannot be used except for in very special situations,<sup>42</sup> the distinctive element separating the two could be the latter’s temporary right of residence in a certain State.<sup>43</sup> Should this element be deemed applicable and relevant given the rights at stake, the differential treatment allowed by Directive 2011/95 would be in line with the Convention and hence with the Charter; otherwise, the national measures laying down such differential treatment would constitute a breach of the Convention and the Charter.

<sup>39</sup> The Court of Justice had the occasion to rule on domestic legislation on social assistance and it relied on Art. 34 with no deference whatsoever based on para. 3: S. PEERS, *The Court of Justice Lays the Foundations*, cit., p. 549.

<sup>40</sup> In the Explanations to the Charter it is stated that Art. 21, para. 1, should be applied in compliance with Art. 14 of the Convention as long as its content mirrors that of Art. 14.

<sup>41</sup> European Court of Human Rights: judgment of 21 February 1986, no. 8793/79, *Jaimés v. the United Kingdom*, para. 46; judgment of 23 October 1997, nos 21319/93, 21449/93, 21675/93, *National and Provincial Building Society v. the United Kingdom*, para. 80; judgment of 12 April 2006, nos 65731/01 and 65900/01, *Stec v. the United Kingdom*, para. 52, and many others. Such a wide margin of appreciation in socio-economic matters is due to the governments’ direct knowledge of the local society and its needs, which leads the Court to ensure a particularly high degree of respect for the legislature’s policy choices unless they are “manifestly without reasonable foundation”.

<sup>42</sup> To put it with the European Court of Human Rights, mere nationality can be a legitimate grounds for distinction for “very weighty reasons”: *Gaygusuz v. Austria*, cit., para. 42 (as well as subsequent judgments on the matter).

<sup>43</sup> In European Court of Human Rights, judgment of 27 September 2011, no. 56328/07, *Bah v. United Kingdom*, para. 41, an alien with indefinite leave to remain in the defendant State was deemed to have an equivalent status to citizenship of that State, i.e. a national of that State was regarded as comparator.

The European Court is open to considering nationals and refugees on equal footing because their statuses involve a poor amount of choice and are therefore difficult (if not impossible, in case of refugees) to change.<sup>44</sup> However, the point here is relevant because in the Qualification Directive those granted refugee status, as well as their family members, are entitled to a residence permit for at least three years with the possibility of renewal (Art. 24, para. 1, of the Qualification Directive); further, those granted subsidiary protection status and their family members should be issued a residence permit valid for at least one year and, in case of renewal, for at least two years (Art. 24, para. 2, of the Qualification Directive). These residence permits are short-term,<sup>45</sup> and therefore their holders cannot in principle be considered equal to nationals. Nevertheless, it is believed that the factual situation underpinning those statuses should prevail because those who hold them remain entitled to reside in a Member State.<sup>46</sup> Moreover, thanks to renewals refugees have a substantially indefinite leave to remain in a host State. Concerning those granted subsidiary protection status, if "in case of renewal" means that States are not obliged to establish the renewal of their residence permits such that applicants can be required to go through the entire application procedure each time their permits expire, their situation is indeed different from that of nationals.<sup>47</sup> This should surely be assessed State by State.

Limitations to social assistance (Art. 29, para. 2, of the Qualification Directive) and access to accommodation (Art. 32, para. 1, of the Qualification Directive)<sup>48</sup> are surely a result of financial considerations. In principle, they constitute legitimate purposes for differential treatment affecting economic and social rights: this clearly emerges from the case-law of the European Court.<sup>49</sup> Some circumstances could favour a positive as-

<sup>44</sup> *Bah v. United Kingdom*, cit., paras 45 and 47.

<sup>45</sup> See the criticism on this choice in UNHCR, Annotated Comments, cit., pp. 39-40, where it is argued that beneficiaries of international protection should be better granted permanent residence.

<sup>46</sup> Cessation of status is respectively regulated in Arts 11 and 16 of Directive 2011/95. The UNHCR highlights that the burden of proof lies on host States: see UNHCR, Guidelines on International Protection of 10 February 2003, no. 3: Cessation of Refugee Status under Art. 1C, paras 5 and 6 of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses).

<sup>47</sup> I believe that this interpretation should be ruled out as unreasonable, yet the phrasing of Art. 24, para. 1, of Directive 2011/95 is ambiguous. I also believe that the different treatment of those granted refugee status and those granted subsidiary protection status in this area is unreasonable, since in principle the prerequisites respectively applicable in the two cases are subject to an equal degree of variability over time. As a matter of fact, this degree of variability heavily depends on specific cases, but surely a general distinction between prerequisites in the terms of Art. 24, para. 1, of Directive 2011/95 appears ill-founded.

<sup>48</sup> According to UNHCR, Annotated Comments, cit., pp. 45-46, the alignment of the level of protection regarding access to accommodation to third country nationals legally resident is not compliant with the Geneva Convention, nor is it supposedly such with relevant human rights treaties. Similarly, in ECRE, Information Note, cit., pp. 15-16, the Union is urged to grant national treatment in accordance with the Geneva Convention. Art. 21 of the Geneva Convention calls for a "treatment as favourable as possible".

<sup>49</sup> European Court of Human Rights, judgment of 8 April 2014, no. 17120/09, *Dhabhi v. Italy*, para. 53.

assessment of the proportionality of the said limitations *vis-à-vis* their alleged budgetary purpose. The one applicable to both is that they are mere possibilities left to the political and economic assessment of the Member States.<sup>50</sup> Concerning access to accommodation, as a matter of fact the differential treatment compared with nationals may prove limited in time, since beneficiaries of international protection may soon find themselves eligible for long-term residence status.<sup>51</sup> In addition, access to accommodation does not extend to housing benefits, which furthermore cannot be regarded as core social provisions covered by the related limitation.<sup>52</sup> Concerning the latter, Art. 29, para. 2, of the Qualification Directive might not *per se* be in breach with the Charter because it should be interpreted restrictively and deemed applicable only to those provisions that the bodies in the Member States responsible for the implementation of the Directive expressly intended to cover.<sup>53</sup>

However, the extent of domestic provisions departing from equal treatment with nationals should also be compliant with the Charter: States' choices in this connection fall within its scope of application set out in Art. 51, para. 1. Here the assessment of the actual restrictions may have a different outcome and particularly the proportionality test may even vary from State to State, since it is to be based on domestic provisions. Such is the parallel application of the Charter – i.e. *vis-à-vis* the EU institutions and *vis-à-vis* the Member States – in connection with an EU act which leaves discretion to Member States: it brings along a dual test of compliance, and it ends up placing upon States the heaviest burden of keeping up with its requirements.

Based on the case-law of the European Court the exclusion of beneficiaries of international protection from non-core social provisions and their differential treatment from nationals regarding access to accommodation calls for a case-by-case assessment. In order to avoid cases where differential treatment is unjustified, national law enshrining the said exclusion or discrimination should establish limitations and exceptions. Indeed, it is very difficult for such an exclusion or discrimination to be compliant with the Charter (and obviously with the Convention, which applies to national conducts) when solely based on nationality and on the status of beneficiaries of international protection who otherwise meet the applicable eligibility conditions.<sup>54</sup> For instance, restrictions should be firmly anchored to their budgetary justification: as it is well known, in *Dhabhi* the margin of appreciation of States in the social security field, though admittedly very wide, was not deemed so wide as to exempt third country nationals (TCNs) from a fami-

<sup>50</sup> In principle, an EU directive provision potentially in breach with the Charter is not such insofar it awards discretion to the Member States. Court of Justice, judgment of 27 June 2006, case C-540/03, *Parliament v. Council*[GC], para. 98.

<sup>51</sup> See above, at the beginning of Section II.

<sup>52</sup> *Kamberaj*[GC], cit., para. 92.

<sup>53</sup> *Ibid.*, paras 86-87.

<sup>54</sup> *Gaygusuz v. Austria*, cit., paras 42-48.

ly allowance solely on the grounds of nationality.<sup>55</sup> Along the same line of reasoning, a mere budgetary justification might work differently depending on the length of the applicant's stay in a Member State, especially with regard to benefits that are contingent on previous payment of contributions.<sup>56</sup>

Discrimination in access to education for adults is less clear. Although it must be due to the absence of international obligations in this area, it is very doubtful that this is a sound basis for granting refugees (as well as other TCNs legally resident, if this is the case) different treatment from that of nationals. Moreover, Art. 27, para. 2, of Directive 2011/95 does not refer to a right to receive free education, nor does it limit discrimination to free education and training, which could be justified on financial grounds. Hence, there is no solid budgetary reason behind the differentiation, whose sole justification seems to be the nationality of the would-be adult students. If such an open-ended and broad exception can be deemed compatible with the Charter,<sup>57</sup> the burden to find solutions that do not constitute a breach of the latter falls entirely upon States.

Directive 2011/95 marks a firm step forward towards the establishment of a uniform status for refugees and persons eligible for subsidiary protection. This is one of the objectives of the Directive, following the Stockholm Programme.<sup>58</sup> The Stockholm Programme and recital 9 of Directive 2011/95 preamble share similar language, in the sense that the uniform status for the two groups of persons who are beneficiaries of international protection is inspired by the legal base in Art. 78 TFEU. In my opinion, this interpretation does not correspond to the phrasing of Art. 78 TFEU, which enables the Parliament and the Council to adopt measures on the uniform status of refugees (let. a)) *and* measures on the uniform status of subsidiary protection (let. b)). Instead (or in addition, should one lean towards the understanding of Art. 78 TFEU in the sense criticized here), granting those concerned equal treatment is in compliance with the Char-

<sup>55</sup> *Dhabhi v. Italy*, cit., para. 53.

<sup>56</sup> In *Gaygusuz v. Austria*, cit., para. 41, the right to emergency assistance claimed by the applicant qualified as a pecuniary right because the applicable legislation linked it to the payment of contributions to an employment insurance fund.

<sup>57</sup> In *Parliament v. Council* [GC], cit., para. 98, the Court of Justice did not rule unconditionally against the existence of a breach of the Charter in the Family Reunification Directive because of the discretion it leaves to Member States (on this point see above, footnote 50). Instead, the fact that such discretion was limited did play a role. The provisions awarding discretion in the two directives are very different, so drawing precise benchmarks from that precedent is not appropriate. However, given that the margin of assessment in Art. 27, para. 2, of the Qualification Directive is virtually unlimited (as explained in the text), this casts doubts on the compatibility of this provision with the prohibition on discrimination on grounds of nationality established in the Charter.

<sup>58</sup> Council Conclusions of 2 December 2009 on *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, paras 6.2 and 6.2.1. The objective concerning the uniform status for those granted international protection, in pursuance of the Stockholm Programme, is highlighted in recital 9 of Directive 2011/95.

ter,<sup>59</sup> as well as with a number of international instruments binding on the Member States (starting with the Convention).<sup>60</sup> This emerges clearly from the comments of the UNHCR to the earlier version of the Qualification Directive, where the difference between the two statuses was pronounced.<sup>61</sup>

Against this background, it should be noted that one of the very few persistent differences is the exception to the right to national treatment concerning social assistance: as repeated above, the exception is exclusively for those granted subsidiary protection status (Art. 29, para. 2, of Directive 2011/95), while those granted refugee status have equal rights as nationals. Given the preceding comments, such a distinction between beneficiaries of international protection is hard to defend:<sup>62</sup> they are all in need of protection; they have neither chosen to place themselves in their situation, nor do they have the possibility to change it. Hence, if their differential treatment is exclusively due to their status, it appears discriminatory. The other possible reason is that the length of their residence permits is different (as long as States do not opt for unified rules); yet the shorter leave of stay for those granted subsidiary protection status is not such as to

<sup>59</sup> See for instance ECRE, Information Note, cit., p. 15, where the elimination of the difference of treatment regarding healthcare is linked to Art. 35 of the Charter.

<sup>60</sup> On the role of the Convention in the approximation of the refugee and the subsidiary protection statuses accomplished in Directive 2011/95 see ECRE, Information Note, cit., p. 12.

<sup>61</sup> The difference in content of the refugee status as compared to the subsidiary protection status currently lies in the length of residence permits (Art. 24 of the Qualification Directive); in travel documents (Art. 25 of the Qualification Directive), where the difference is apparently due to the practical reason that refugees would typically not have carried them; and in the right to access to social assistance (Art. 29 of the Qualification Directive). In the framework of the previous Qualification Directive, further differences lay in the right to access to employment, insofar as beneficiaries of subsidiary status could be subject to prioritisation “for a limited period of time to be determined in accordance with national law” (Art. 26, para. 3, of Directive 2004/83); in the right to employment-related education opportunities for adults, vocational training and practical workplace experience, which for beneficiaries of subsidiary protection could be subject to conditions to be decided by the Member States (Art. 26, para. 4, of Directive 2004/83); in the right to health care, which for the latter could be limited to core provisions (Art. 29, para. 2 of Directive 2004/83); and in the right to access to integration facilities (Art. 33 of Directive 2004/83). Moreover, the benefits of international protection could be withdrawn whenever the subsidiary protection status (but not the refugee status) had been “obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a person eligible for subsidiary protection” (Art. 20, para. 7, of Directive 2004/83). Besides commenting on specific provisions of Directive 2004/83, the UNHCR expressed its worries on the extensive difference in treatment between the content of refugee status and subsidiary protection status at large: see UNHCR, Annotated Comments, cit., p. 36.

<sup>62</sup> The criticism that attributes the persistent differences in the treatment of beneficiaries of subsidiary protection *vis-à-vis* those granted refugee status to an old-fashioned “economic protectionism” is particularly spot-on here: G. MORGESE, *La direttiva 2011/95/UE sull'attribuzione e il contenuto della protezione internazionale*, in *La Comunità internazionale*, 2012, p. 274.

justify a differential treatment in social assistance at large.<sup>63</sup> Moreover, the aforementioned comment on the relevance of the statuses rather than on the length of residence permits applies here as well.

Another interesting issue concerns what should be understood by “third-country nationals legally resident”, to whom States are obliged to give uniform access to education, to social assistance and to accommodation of those granted international protection status (as limited to beneficiaries of subsidiary protection with regard to social assistance). It is well-known that EU legislation covers limited categories of third-country nationals in terms of their right of residence in Member States. They have different statuses, with rules set out in dedicated directives. The reason for understanding “third-country nationals legally resident” as “legally resident in accordance with EU law”, notably with those directives, is that of uniformity. Moreover, such an interpretation is consistent with the Court of Justice’s traditional course of action of pursuing the autonomy of EU law from the legislation of the Member States. Yet this interpretation could well be questioned on grounds of the fragmented approach of the Union to the matter, which makes it difficult if not arbitrary to identify the legal regime to be extended to refugees. It seems reasonable to rely on Directive 2003/109 in connection with those beneficiaries of international protection who have been legally residing in a Member State for at least five years, even if they have not yet obtained the status of long-term residents. This solution is surely compliant with the principle of non-discrimination, since awarding long-term resident refugees the same treatment as, for instance, seasonal workers could well be deemed disproportionate. Instead, for the others national law seems the only reasonable option. As pointed out earlier in this section, States’ action on the matter falls within the scope of the Charter: this is deemed to ensure a common minimum standard.

#### IV. THE CASE OF DISCRIMINATORY RESIDENCE-RELATED BENEFITS

While granting beneficiaries of international protection the right to access to accommodation under equivalent conditions as other third-country nationals legally resident in their territories, Directive 2011/95 enigmatically states that Member States are also allowed leeway as to their “dispersal”. In so doing, States should nonetheless prevent them from being discriminated against and offer them equal opportunities regarding access to accommodation. This provision raised worries among stakeholders in connection with Art. 26 of the Geneva Convention, which obliges States to ensure the right of choice of residence and freedom of movement to refugees under the same conditions

<sup>63</sup> The difference in the length of residence permits for beneficiaries of refugee status and for beneficiaries of subsidiary protection status respectively received harsh criticism: UNHCR, *Annotated Comments*, cit., p. 40; ECRE, *Information Note*, cit., p. 13.

as other aliens.<sup>64</sup> The Qualification Directive features a provision mirroring Art. 26 of the Geneva Convention in Art. 33.

National measures on dispersal of beneficiaries of international protection have become a current topic thanks to the landmark case of *Alo and Oso*. Here the application of geographical restrictions was not assessed *per se*, but insofar as entailing discrimination with nationals of the host State and with other third-country nationals legally resident there, in alleged breach with the Qualification Directive. More specifically, German law sets out that residence permits granted to beneficiaries of international protection may be combined with an obligation of residence in a defined area if they are in receipt of social benefits. The Court first ascertained that an obligation of residence constitutes a limitation to freedom of movement within the meaning of Art. 26 of the Geneva Convention and, consequently, of corresponding Art. 33 of the Qualification Directive.<sup>65</sup> Since the latter prohibits obligations of residence on beneficiaries of international protection as long as they are discriminatory in comparison with other third-country nationals, the Court carried out an assessment on the existence of such discrimination. Moreover, given that the restriction on freedom of movement was linked to the reception of social benefits, Art. 29 of Directive 2011/95 also came to the fore. As stated above, according to Art. 29 social assistance should be awarded on equal footing with nationals including core provisions, which can well be denied to beneficiaries of subsidiary protection status (the applicants were such); yet, if granted, the national treatment rule should apply.<sup>66</sup>

Jumping to the findings of the Court, an obligation of residence linked to the receipt of social benefits is in breach with Arts 29 and 33 of the Qualification Directive as long as it is aimed at the apportionment among the competent territorial bodies of the financial burden. However, it is not such as long as it is aimed at facilitating the social integration of beneficiaries of integration protection. Both findings rely on an assessment focussed on whether the obligation of residence is discriminatory against beneficiaries of international protection with respect to nationals and other third-country nationals: it was deemed respectively discriminatory as compared to German nationals as long as it was aimed at the distribution of the financial burden, and in principle non-discriminatory as compared to other third-country nationals as long as it was aimed at enhancing social integration.

The referring judge's (and the subsequent Court of Justice's) choice to carry out the assessment on the discriminatory character of the contested national measure separately in connection with its alleged twofold purpose appears commendable.<sup>67</sup> As

<sup>64</sup> ECRE, Information Note, cit., p. 16.

<sup>65</sup> *Alo and Oso* [GC], cit., paras 22-40.

<sup>66</sup> *Ibid.*, paras 49-50.

<sup>67</sup> The compatibility of the purpose of sharing the financial burden related to social benefits with Arts 29 and 33 of the Qualification Directive is the object of question 2 (*Alo and Oso*, cit., paras 41-56); the

emerged in Section III, whether or not a measure establishing a distinctive treatment *vis-à-vis* two comparable individuals is in fact discriminatory depends on its purpose and its pursuit thereof – e.g. if its purpose is illegitimate, or if it pursues a legitimate purpose in a disproportionate fashion. Equally praiseworthy is the Court of Justice’s assessment of the situation of the applicants with different comparators in connection with the two different purposes mentioned above. When evaluating discrimination on grounds of the aim of sharing the financial burden of social assistance among territorial bodies, the Court compared the applicants *as beneficiaries of subsidiary protection* with refugees proper, other third-country nationals legally resident, and German nationals who were recipients of corresponding social benefits.<sup>68</sup> When evaluating discrimination on grounds of the aim of facilitating the social integration of those in receipt of social benefits, the Court considered the applicants as beneficiaries of international protection in general terms and compared them with nationals, only to immediately rule any further assessment out,<sup>69</sup> and with third-country nationals legally resident in Germany for reasons other than political, humanitarian or otherwise arising from international law.<sup>70</sup> Hence, the Court’s methodology in this case is deemed to be flawless.

Turning to the merit of the Court of Justice’s conclusion on social integration, it can be shared mainly to the extent that it calls for a case-by-case assessment and leaves the final word to national authorities.

As anticipated, the Court held the obligation of residence aimed at beneficiaries of international protection as non-discriminatory in comparison with other third-country nationals equally in receipt of social benefits. The reason is that the situation of the two social groups in relation with social integration is typically different: unlike beneficiaries of international protection, the stay of other third-country nationals legally resident in Germany is generally subject to a condition that they are able to support themselves; in addition, they are usually eligible for social benefits only after a certain period of continuous legal residence. This leads to the presumption that those third-country nationals are usually sufficiently integrated in Germany, so that the application to the sole beneficiaries of international protection of the obligation of residence when in receipt of social benefits is non-discriminatory. Indeed, such obligation is “to prevent the concentration in certain areas of third-country nationals in receipt of welfare benefits and

compatibility of the purpose of facilitating the social integration of those in receipt of such benefits with Arts 29 and 33 is the object of question 3 (*Alo and Osso* [GC], paras 57-64).

<sup>68</sup> *Alo and Osso* [GC], cit., para. 56.

<sup>69</sup> *Ibid.*, para. 59. The Court ruled that a comparison with German nationals was not relevant because they and beneficiaries of subsidiary protection were not in a comparable situation as far as the objective of facilitating social integration was concerned: hence the (implicit) conclusion that there was no breach of Art. 29 of Directive 2011/95.

<sup>70</sup> *Alo and Osso* [GC], cit., para. 63. The statement that the Court compared the applicants as beneficiaries of international protection in general terms is based on this paragraph (i.e. the core of the Court’s reasoning).

the emergence of points of social tension with the negative consequences which that entails for the integration of those persons".<sup>71</sup>

The problem here is not that this line of reasoning is ill-founded. The problem is that it is based on the assumption that, unlike other third-country nationals legally resident in a Member State, beneficiaries of international protection who are eligible for social benefits have not yet spent a long period of time in their host State, have never been able to support themselves and have little if no social network capable of helping them improve their situation. This may be true or not, depending on the circumstances, yet the Court ruled in favour of such an assumption.

Hence, with great respect, what is *not* commendable in the Court's decision is that, in the wake of Directive 2011/95, it marks an openness towards restrictions on the freedom of movement of beneficiaries of international protection which is indeed worrying.<sup>72</sup>

In addition, it is a matter of common knowledge that a network with fellow countrymen or countrywomen or with fellow beneficiaries of international protection is the best tool for social integration, particularly as regards access to accommodation and to the labour market. Therefore, dispersal is often questionable in terms of social integration, and more specifically it may have a negative impact on the right to work and on access to accommodation of those concerned.<sup>73</sup>

Last, if it is true that the Court calls for a case-by-case assessment, it gives no guidelines for this assessment to be carried out in accordance with the Qualification Directive and with the Charter.

## V. WHAT ROOM IS THERE FOR INTEGRATION MEASURES OR AFFIRMATIVE ACTIONS ESTABLISHED OR COORDINATED AT THE UNION LEVEL?

Equality of rights with nationals as a tool for social integration of beneficiaries of international protection is as essential as it is unsatisfactory for their patently different factual situation. The UNHCR has long insisted on the necessity for States to take a proactive attitude in this connection and to make an effort to overcome refugees' vulnerability, which makes their road to social integration particularly tough.<sup>74</sup> It must be

<sup>71</sup> *Ibid.*, para. 58.

<sup>72</sup> It has been argued that in *Alo and Osso* the Court used social integration as a precondition for being given access to social rights: K.M. DE VRIES, *The Integration Exception: a New Limit to Social Rights of Third Country Nationals in European Union Law?*, in D. THYM (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity of the EU*, Oxford: Hart, 2017, pp. 278-281.

<sup>73</sup> Interestingly, in ECRE, Information Note, cit., p. 16, the apparent discretion on national dispersal mechanisms raises concerns in connection with its impact on the right to work of beneficiaries of international protection.

<sup>74</sup> UNHCR, Note on the integration of refugees in the European Union, cit., *passim*. On this point see also powerful statements of ECRE, Position on the integration of refugees, December 2002, [www.ecre.org](http://www.ecre.org), para. 61 *et seq.*

acknowledged that the European institutions have always shown awareness in this connection. The preamble of Directive 2011/95 could not be clearer: "In order to enhance the effective exercise of the rights and benefits laid down in this Directive by beneficiaries of international protection, it is necessary to take into account their specific needs and the particular integration challenges with which they are confronted".<sup>75</sup>

This statement matches up with several provisions.

The goal of some of them is to make it possible for beneficiaries of international protection to take advantage of a set of rights that would otherwise remain a dead letter. For instance, equal treatment with nationals in access to procedures for recognition of qualifications means little in absence of documentary evidence of such qualifications and the possibility of retrieving it from one's country of nationality (or of habitual residence, in case of stateless persons) for an array of practical reasons linked either to the situation of the applicant or his/her country of nationality or habitual residence, or simply to the related costs. Hence, Art. 28, para. 2, lays down the obligation for States to "endeavour to facilitate full access for beneficiaries of international protection who cannot provide documentary evidence of their qualifications to appropriate schemes for the assessment, validation and accreditation of their prior learning." This leaves States broad discretion, but at least establishes an obligation of result, which marks some progress from the absence of any such provisions in Directive 2004/83.<sup>76</sup>

In a way, the goal to have beneficiaries of international protection assert their rights is shared by Art. 34 of Directive 2011/95 on access to integration facilities. Art. 34 sets out States' obligation to "ensure access" to integration programmes tailored in such a way as to meet the special needs of those granted international protection, or "to create pre-conditions which guarantee access to such programmes". The link of integration programmes with the actual enjoyment of the rights laid down in Directive 2011/95 is highlighted in the preamble. Recital 47 details that such programmes should include language training if needed and "the provision of information concerning individual rights and obligations relating to their protection status in the Member State concerned". The deletion, in Art. 34, of discrimination between refugees proper and those granted subsidiary protection status is another welcome novelty of the recast Qualification Directive.<sup>77</sup>

Sometimes, in the context of a right granted to nationals and beneficiaries of international protection on an equal footing, the specific needs of the latter call for special treatment. Accordingly, the right to healthcare closes with a specific obligation which

<sup>75</sup> Recital 41 of Directive 2011/95. See also, Communication COM(2011) 455 final, cit., para. 1.4.

<sup>76</sup> This novelty in the recast Qualification Directive is welcome in ECRE, Information Note, cit., p. 14.

<sup>77</sup> Directive 2004/83 contained a provision corresponding to Art. 34 of the current Directive 2011/95 with regard to those granted refugee status (in Art. 33, para. 1), plus one laying down the same obligation to the advantage of those granted subsidiary protection status "[w]here it is considered appropriate by Member States" (Art. 33, para. 2, of Directive 2004/83). The removal of such differential treatment was encouraged in UNHCR, Annotated Comments, cit., p. 46.

takes into account that those who qualify for refugee and subsidiary protection status often have a traumatic background. I refer to Art. 30, para. 2, of Directive 2011/95 which binds States to provide them with adequate healthcare, under the same eligibility conditions as nationals, including treatment of mental disorders when needed. Among those entitled to such special healthcare are “persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict”. Indeed, physical recovery and mental healing are key for social integration of those granted international protection, primarily for children and other particularly vulnerable persons, but also for adults. Regrettably, it is unclear whether such appropriate, specific healthcare is due to beneficiaries of international protection unconditionally, with the sole exception being the requirement of making it equally open to nationals, or is due only if made available to nationals who share the vulnerability conditions listed in Art. 30, para. 2. It seems to me that both options are compatible with the phrasing of Art. 30, para. 2, of Directive 2011/95. The latter is consistent with the way socio-economic rights are traditionally interpreted, yet it substantially weakens the impact of Art. 30, para. 2, as an integration tool for beneficiaries of international protection, beyond its obvious content in terms of protection of human rights. The former is considerably more far-reaching. In its favour, it should be considered that the contrary interpretation would frustrate the *effet utile* of Art. 30, para. 2, while recital 41 of the preamble sets as a goal of Directive 2011/95 the necessity to take into account refugees’ specific needs “in order to enhance the effective exercise of the rights and benefits laid down” therein. For those States who do not provide adequate healthcare for nationals sharing the same vulnerability as refugees, Art. 30, para. 2, would be entirely absorbed in para. 1. In addition, an unconditional obligation for States to provide beneficiaries of international protection with the special healthcare laid down in Art. 30, para. 2, is not contradictory with the last part of recital 41. This rules out more favourable treatment than that awarded to nationals of those within the remit of Directive 2011/95: not only is such favourable treatment not required in the interpretative option supported here but, as highlighted above, its exclusion is a fundamental point also in this interpretative option.

The last part of recital 41 referred to above shows that Directive 2011/95’s determination to meet the special needs of those granted international protection in order to support their social integration is not accompanied by a policy of affirmative actions to their advantage. The Union retains the competence to take measures to this end, as laid down in Art. 18 TFEU. The Directive does not even remain neutral in this connection, as recital 41 of the preamble reads as follows: “[The] taking into account [of specific needs and the particular integration challenges of beneficiaries of international protection] should normally not result in a more favourable treatment than that provided to their own nationals, without prejudice to the possibility for Member States to introduce or

retain more favourable standards". Since this statement is contained in the preamble, its interpretation as calling on States to avoid affirmative actions should be rejected. It is believed that, if binding, such a measure would have no legal basis in the EU Treaties beyond being in breach with the Charter.

Needless to say, the Union's aversion to affirmative actions is entirely inconsistent with its much reiterated commitment to support the integration of those granted international protection by addressing their specific needs and by making efforts to overcome their vulnerability. It is true that, since affirmative actions entail a reverse discrimination of other TCNs and/or own nationals, they have a social impact that host States are surely better placed to assess and deal with. However, a Union role in their coordination could bring balance to the Common Asylum System because it would help minimize the appeal of some States *vis-à-vis* others as "granters" of international protection. Moreover, establishing minimum standards at the Union level would discourage States with growing anti-immigration feelings from reducing their integration efforts.

The Qualification Directive does not set minimum standards concerning integration programmes either: as said earlier, Art. 34 establishes a mere obligation to give access to such programmes and to ensure that they are fit for the specific needs of those granted international protection. Yet, like that for affirmative actions, an enhanced role of the Union could help harmonize States' integration facilities and contribute to make all of them equally attractive and successful in the achievement of a common goal.<sup>78</sup> The existence of a legal base in the TFEU enabling the Union to harmonize national integration programmes is very doubtful. Art. 78 TFEU, which is focused on refugees and subsidiary/temporary protection, says nothing as to a competence of the Union regarding the integration of those who fall within its remit, while Art. 79, para. 4, TFEU, focussed on other TCNs, does enable the Union to take measures in this area. The joint reading of those provisions could lead to the exclusion of any competence of the Union on the integration of refugees and beneficiaries of subsidiary or temporary protection. Indeed the opposite interpretation has prevailed, since Arts 78, para. 2, and 79, paras 2 and 4, TFEU constitute the legal base of the Asylum, Migration and Integration Fund, which supports EU countries also in actions related to the integration of persons whose stay is secure.<sup>79</sup> Yet such

<sup>78</sup> ECRE's considerations on national and regional governments being best placed to develop integration strategies are definitively to agree with (ECRE, Position on the integration of refugees, cit., paras 64-66), yet the building of a successful *common* asylum system in the Union requires Member States to be equally committed to integration of beneficiaries. The application of common minimum standards throughout all the Member States is a natural development to this end. That should rely on the previous screening of measures already tested and the identification of those which proved more effective or essential, to the advantage of less experienced or deficient States.

<sup>79</sup> Regulation (EU) 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC.

legal base is limited to support actions, “excluding any harmonisation of the laws and regulations of the Member States”.<sup>80</sup> However, funding specific activities within Member States is a powerful tool for the Union to push States towards a harmonized system of integration programmes. On a positive note, the Commission has long made available financial support in the framework of the above-mentioned Fund (drawing resources from the European Regional Development Fund and the European Social Fund): such support covers national services on language-learning and vocational training, access to the labour market, and campaigns aimed at raising awareness of both local communities and migrants, among others.<sup>81</sup> The role of European funding in this connection could be further enhanced by building on States’ practice on the implementation of the Qualification Directive: interestingly, recital 48 of its preamble calls for the evaluation of such implementation in such a way as to consider “the development of common basic principles for integration”. The competence on support actions should well be used to improve the application of such principles.

## VI. ASYLUM SEEKERS IN A STATE OF LIMBO

The socio-economic rights and the prohibition against discrimination on grounds of nationality laid down in the Charter – as well as in the Convention and other international human rights treaties – are fully applicable to those awaiting a decision on their application for international protection.<sup>82</sup> However, in principle their unique situation leaves room for them to be treated differently. Here the role of human rights law is to place restrictions on States’ reluctance to award those in that uncertain position socio-economic rights: as usual, these restrictions are compliant with the Charter (and with other international treaties) only if they have a legitimate purpose and if they are proportionate.

<sup>80</sup> Art. 79, para. 4, TFEU is generally referred to as the specific legal base for integration: G. CAGGIANO, *Riflessioni su proto-integrazione dei richiedenti asilo e diversità culturale*, in *SIDIBlog*, 29 June 2016, [www.sidiblog.org](http://www.sidiblog.org), section 2. Regarding Art. 79, para. 4, TFEU as the new legal base, introduced by the Lisbon Treaty, of newly acquired Union competences on the integration of migrants see extensively L. DANIELE, *Immigrazione e integrazione. Il contributo dell'Unione europea*, in G. CAGGIANO (ed.), *I percorsi giuridici per l'integrazione*, cit., pp. 64, 68, 73-77. For the evolution of the EU action in support of the integration of migrants (including beneficiaries of international protection) also in connection to the changes in legal bases, starting from the Court of Justice landmark judgment of 9 July 1987, joined cases 281/85, 283/85, 285/85, 287/85, *Germany v. Commission*, on the lack of the European Community competence on cultural integration of migrants, through the role of European funding (and beyond), see G. CAGGIANO, *L'integrazione dei migranti fra soft-law e atti legislativi*, cit., pp. 30-38.

<sup>81</sup> G. CAGGIANO, *Riflessioni su proto-integrazione*, cit., para. 5.

<sup>82</sup> Economic and Social Council, Report of the Special Rapporteur, cit., para. 26. In general terms on the application of the Charter to asylum seekers see F. IPPOLITO, *Migration and Asylum Cases Before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?*, in *European Journal of Migration and Law*, 2015, p. 22 *et seq.*

Despite the said constraints, European Union law allows Member States to place asylum seekers in a limbo which can become detrimental to their social integration should their application be approved – especially if the related proceedings prove lengthy, as they often do. This clearly emerges from the Qualification Directive, whose provisions usually apply only after a decision on the applicant's status has been taken. Indeed, nothing in that Directive prevents States from taking a different course of action: the various provisions on a certain right needing to be awarded after (if not *immediately* after) status is granted<sup>83</sup> are not aimed at preventing those rights from being awarded earlier. Instead, they ensure that States do not delay their implementation. However, those who make an application for international protection in a Member State, as long as they are allowed to remain in the territory as applicants (along with their family members if covered by such application), fall within the scope of Directive 2013/33, i.e. the Reception Conditions Directive (Art. 3).<sup>84</sup> Hence, the relevant legal machinery is built around the idea that they should receive differential treatment.

Early efforts towards the social integration of those seeking international protection – also referred to as proto-integration of asylum seekers –<sup>85</sup> are increasingly being called for. There is surely a political necessity for these measures: the reasons why they are key for future successful integration have been explained convincingly; moreover, some interesting thoughts on their usefulness (e.g. that of vocational training) in case applicants are repatriated have also been put forward.<sup>86</sup> The Reception Conditions Directive is very underdeveloped in this connection: for instance, it lays down that Member States “*may allow* applicants access to vocational training” (Art. 16), but says nothing on language classes for adults. One may guess that, if provided, the latter might help discourage those secondary movements of asylum seekers towards States where they experience no language barrier, whose prevention are a priority at the time of writing. Moreover, some provisions may be not in breach with the Charter and other human rights obligation of the Member States, but they appear short-sighted in terms of future social integration. For instance, based on Art. 17, para. 3, of Directive 2013/33 material reception conditions and healthcare may be made subject to the condition that “applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence”: in such cases, applicants may be required to cover or contribute to the related costs or be asked for a refund (Art. 17, para. 4, of Directive 2013/33). After all, receiving free material support by public authorities is usually

<sup>83</sup> See Arts 24 (on residence permits), 26 (on access to employment) and 31 (on unaccompanied minors) of Directive 2011/95.

<sup>84</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

<sup>85</sup> G. CAGGIANO, *Riflessioni su proto-integrazione*, cit., section 2.

<sup>86</sup> UNHCR, Note on the integration of refugees, cit., esp. paras 8-10. Para. 12 underlines the beneficial effects of vocational training for reintegration of rejected asylum seekers upon return.

provided only if recipients are unable to cover the related costs; sometimes the same applies to public healthcare, to a minor extent. However, withdrawing financial resources from individuals who find themselves in a position to start a career or business, find accommodation, learn a new language, receive or update their education or training, and so on – in a country where they have typically no background – may obviously be counterproductive. To say the least, States should be encouraged to established loan schemes for those who obtain the status, or to apply Art. 17 of Directive 2013/33 only to those who are not successful in their applications (although this may discourage them from seeking asylum).

As usual with EU directives, States are free to apply more favourable conditions (Art. 4 of Directive 2013/33). However, practice has shown that most States have little inclination to raise standards or to award rights not provided for in directives (e.g. access to education for adults). Unfortunately, especially regarding immigration policy, States tend to make only the minimum effort.

Beyond taking note of the gaps in the Reception Conditions Directive, in a legal analysis on the limbo it creates for asylum seekers, their differential treatment should be subject to assessment.

Under Art. 15, para. 1, of Directive 2013/33 asylum seekers should have access to the labour market “no later than 9 months from the date when the application for international protection was lodged”. This provision appears purely discriminatory as it allows a differential treatment with no credible justification. Indeed, there is no way to link the uncertain future of applicants in the host country or their alleged temporary presence there to a “grace period” of nine months (maximum) before they can take advantage of their right to have access to work.

## VII. CONCLUSIONS

By establishing national treatment as the standard rule applicable to socio-economic rights, the Qualification Directive overall represents a good platform for the social integration of beneficiaries of international protection. Generally speaking, its shortcomings arise not from the number of exceptions to such rule, which is limited, but from their far-reaching character.

The exceptions are such because they contradict the commitment to social integration of migrants on which the European institutions constantly insist, and likewise the main actors in the area including UNHCR. For instance, allowing States to exclude beneficiaries of international protection from access to accommodation contributes to the marginalization of the weakest persons in a society. These are typically newcomers, as those who obtain long-term residence status are awarded access to accommodation on the same grounds as nationals. At the same time, if they hold subsidiary protection sta-

tus they can also be excluded from non-core social assistance provisions, which can make their integration path even more difficult.<sup>87</sup>

Moreover, the few provisions derogating from the national standard award States huge discretion.

It is true that, while implementing the Qualification Directive, States are acting within the scope of application of the Charter, so that their discretion is firmly bound to the latter's provisions on specific socio-economic rights and on the prohibition against discrimination. *Alo and Oosso* shows that this may be a sound safety net: the alignment of freedom of movement to third-country nationals legally resident (Art. 33 of the Qualification Directive) did not prove a blank check to discriminate between beneficiaries of international protection and nationals of the host State. All the more so this emerges from *Kamberaj*, where the Charter channelled the interpretation of a rule establishing an exception to the national standard in such a way as to considerably limit its reach.<sup>88</sup>

However, beyond potentially impairing socio-economic rights of beneficiaries of international protection as a matter of fact, such discretion has other disadvantages. As already highlighted, it creates imbalances in the Common Asylum System because it lays the foundations for remarkable differences in the social integration toolkit of the Member States. Moreover, it favours a level of litigation between beneficiaries of international protection and national or regional authorities which does no good to the former's sense of belonging to their host society, which is the essence of social integration. To date, the Court of Justice has shown no inclination to consider such broad discretion to be in breach with the Charter. This places the burden of keeping with the Charter's standards mainly upon States. They could at least reduce the lottery of the case-by-case assessment by national judicial authorities (correctly encouraged by the Court of Justice in *Alo and Oosso*) by establishing precise conditions and exceptions to domestic legal provisions which take advantage of the derogations allowed to the national treatment.

<sup>87</sup> See A. EIDE, A. ROSAS, *Economic, Social and Cultural Rights: a Universal Challenge*, in A. EIDE, C. KRAUSE, A. ROSAS (eds), *Economic, Social and Cultural Rights. A Textbook*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 2001, p. 18: the right to social assistance is deemed essential when a person does not have the necessary property available or is not able to secure an adequate standard of living through work.

<sup>88</sup> As said above, *Kamberaj* concerns a rule in Directive 2003/109, whose content is reflected in a rule of the Qualification Directive.

